KENNETH W. DAVIS
v.
ACTING ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-125-A Decided April 6, 1995

Appeal from a decision declining to partition inherited interests in a trust allotment.

Affirmed. 18 IBIA 16 clarified.

1. Indians: Lands: Allotments: Partition

25 U.S.C. § 378 (1988) governs partition of trust allotments on reservations where the governing tribe rejected the Indian Reorganization Act, 25 U.S.C. § 461 (1988).

2. Indians: Lands: Allotments: Partition

Neither 25 U.S.C. § 378 (1988) nor 25 CFR 152.33(b) requires that all co-owners of a trust allotment agree to a partition of the allotment.

3. Board of Indian Appeals: Jurisdiction--Indians: Lands: Allotments: Partition

In reviewing a Bureau of Indian Affairs decision concerning whether an allotment should be partitioned, the Board of Indian Appeals does not substitute its judgment for that of the Bureau. Rather, the Board's responsibility is to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

4. Indians: Lands: Allotments: Partition--Indians: Trust Responsibility

The trust responsibility does not require that the Bureau of Indian Affairs partition an allotment for the benefit of one co-owner when it finds that partition would be detrimental to the interests of the other co-owners.

APPEARANCES: James L. Vogel, Esq., Hardin, Montana, for appellant; Kevin Gover, Esq., Albuquerque, New Mexico, for Blanche M. Delorme English.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Kenneth W. Davis seeks review of an April 14, 1994, decision of the Acting Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), denying appellant's application for partition of Turtle Mountain Allotment 1001. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

Allotment 1001 on the Turtle Mountain Reservation was the original allotment of Francois Delorme, to whom a trust patent was issued in 1909. The allotment contains 160 acres, more or less, and is described as the NE 1/4, sec. 34, T. 162 N., R. 71 W., fifth principal meridian, Rolette County, North Dakota. Ownership is presently shared by 14 heirs of the original allottee. Appellant holds a 1/4 interest. The other owners hold smaller interests. 1/

Sometime prior to July 16, 1993, appellant applied at the Turtle Mountain Agency, BIA, to have the allotment partitioned. He requested that he be granted sole ownership of the northeast quarter of the allotment, containing 40 acres, and that the other 13 owners be granted shared ownership of the remaining 120 acres.

On July 16, 1993, the Superintendent sent notices to the Indian co-owners, describing the proposal. 2/ He asked them to either sign the proposal, indicating agreement, or notify the Agency of any objections. A second notice was sent on September 14, 1993. The second notice repeated the text of the first and added the sentence: "Should this office not receive a response within 30 days of the above date, it will be assumed that you have no objections to the division proposed by [appellant]."

The Agency received responses from seven co-owners. Two co-owners specifically agreed to appellant's proposal and four objected to it. One

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1/ As shown in the record, the other owners and their respective shares are: Sylvester Davis (90/1440); Stella J. Davis (90/1440); Blanche M. Delorme English (156/1440); Estella Ruth Delorme Garcia (156/1440); Lucy Rhea Delorme Wilson Kness (156/1440); Lily Jeanette Davis Gourneau (90/1440); Francis X. Davis, Jr. (18/1440); Debra Davis Hogenson (18/1440); Terry L. Davis Brown (18/1440); Brenda L. Davis Kriskovich (18/1440); William A. Davis (18/1440); Robert G. English (96/1440); and Nina Louise Delorme (156/1440 in fee status).

In his appeal documents, appellant states that he has now purchased one of these interests. Although he does not identify the seller, it appears that the interest purchased was a 90/1440 interest.

2/ The Agency had no address for Nina Louise Delorme, a non-Indian who had received a fee patent for her interest in 1964.

co-owner apparently believed that a sale of the allotment was being proposed, and he objected to any sale. 3/ Two of the objectors stated that they believed the allotment should be partitioned between the Delorme and Davis sides of the family. One co-owner objected to partition of the northeast quarter to appellant because it contained the original house of Francois Delorme, where he (the objector) had lived as a child. This co-owner requested that a portion of the northeast quarter be partitioned to him. The fourth objector gave no reasons for her objection at that time, although she has stated her reasons during the course of this appeal.

The Superintendent transmitted appellant's proposal, the co-owners' responses, and an appraisal to the Area Office, requesting comments. The Area Director's response stated:

> All of the owners are not agreeable and it appears that this partition would be dividing the land into undesirable units to those who want a proportionate share an the same area as [appellant]. We suggest that, perhaps, * * * the landowners discuss among themselves, their ideas on what specific area they are interested in acquiring through this partition.
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> Based on comments by the landowners, it is our opinion that it is not feasible or advantageous to the landowners to partition this allotment without favorable concurrence among themselves.
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> We suggest that you provide [appellant] with the responses received from the other heirs. Perhaps, a consensus can be reached among the heirs to effect a partition of the allotment which would be satisfactory to all.

(Area Director's Jan. 6, 1994, Memorandum).

On January 26, 1994, the Superintendent wrote to appellant, transmitting a copy of the Area Director's memorandum and copies of the co-owners' responses. His letter stated in part: "A partition must be advantageous to all owners before approval. * * * Since all owners are not in agreement with the partition and it does not appear feasible to all land owners, your request for partition is hereby denied."

Appellant appealed to the Area Director, who affirmed the Superintendent's decision, stating:

> While we do not believe the consensus of all landowners is required, we do believe that it is necessary that they be informed of any action affecting their trust interests in Indian lands.

3/ In March 1994, while this matter was pending before the Area Director on appeal, this co-owner submitted a statement consenting to appellant's proposal. At about the same time, three co-owners who had not previously responded submitted similar consents.

> In response to [appellant's] petition, some of the co-owners showed a willingness to work with [appellant] to effect a partition. Some of the co-owners were interested in receiving their proportionate share in the same area [appellant] is to receive through his application for partition. It is our decision not to approve a partition, whereby, a co-owner does not wish to receive undesirable property he does not want nor is unable to use.
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> The decision to disapprove [appellant's] application for partition, was not based primarily on the consensus of all the co-owners, but on the merits of the application itself.
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> In order to approve a partition, the petition should be effected only where such partition is advantageous to all the heirs or devisees. The partition should be feasible, equitable, and beneficial to all the heirs. It is our opinion that [appellant's] application for partition does not met this criteria.

(Area Director's Apr. 14, 1994, Decision at 1).

Appellant appealed this decision to the Board. Briefs were filed by appellant and by Blanche M. Delorme English.

Discussion and Conclusions

On appeal to the Board, appellant first contends that BIA has not yet made a decision on the merits of this matter and that a decision on the merits is required under Sampson v. Andrus, 483 F. Supp. 240 (D.S.D. 1980). Appellant argues that the Superintendent's decision was based solely on the fact that not all the co-owners agreed to the partition. He disputes the Area Director's statement that "[t]he decision to disapprove [appellant's] application for partition, was not based primarily on the consensus of all the co-owners, but on the merits of the application itself."

In Sampson, it was held that 25 U.S.C. § 483 (1988) 4/ does not require that all co-owners of a fractionated allotment consent to a partition and that it was therefore error for BIA to decline to consider a partition request simply because it was not agreed to by all co-owners. The court stated:

> In view of this Court's construction of § 483, the Secretary has acted in excess of his authority by refusing to consider plaintiff's application. This is not to say that the Secretary must approve it, but he must give it the same consideration he has previously given similar applications with all Indian owners joined. This Court cannot, of course, control the Secretary's discretion, and it may be that the refusal of plaintiff's sister to join in the application could be a factor in the Secretary's

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4/ All further references to the United States Code are to the 1988 edition.

> determination of whether a partition would be beneficial. The Secretary may not, however, refuse to exercise his discretion on the sole grounds that a co-tenant in an allotment did not sign the application.

483 F. Supp. at 244.

[1] 25 U.S.C. § 483 applies to lands held by individual Indians under the Indian Reorganization Act (IRA), 25 U.S.C. § 461, or the Oklahoma Indian Welfare Act (OIWA), 25 U.S.C. § 501. 5/ Because the Turtle Mountain Band of Chippewa Indians rejected the IRA, 6/ neither the IRA nor 25 U.S.C. § 483 applies to lands on the Turtle Mountain Reservation. See 25 U.S.C. § 478. 7/ Therefore, the statutory provision governing partition on the Turtle Mountain Reservation is 25 U.S.C. § 378, which provides:

> If the Secretary of the Interior shall find that any inherited trust allotment or allotments are capable of partition to the advantage of the heirs, he may cause such lands to be partitioned among them, regardless of their competency, patents in fee to be issued to the competent heirs for their shares and trust patents to be issued to the incompetent heirs for the lands respectively or jointly set apart to them * * *. [8/]

BIA's regulation concerning partition, 25 CFR 152.33, is divided into two parts, the first of which addresses partition without application. The second part of the regulation is relevant here. It provides:

> (b) Application for partition. Heirs of a deceased allottee may make written application, in the form approved by the Secretary, for partition of their trust or restricted land. If the Secretary finds the trust lands susceptible of partition, he may issue new patents or deeds to the heirs for the portions set aside to them. If the allotment is held under a restricted fee title (as distinguished from a trust title), partition may be

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5/ 25 U.S.C. § 483 derives from the Act of May 14, 1948, 62 Stat. 236. It provides:

"The Secretary of the Interior, or his duly authorized representative, is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians under the provisions of [the IRA] or [the OIWA]."

6/ See Haas, Ten Years of Tribal Government under the I.R.A. 18 (1947).

7/ Certain provisions of the IRA have been made applicable to all tribes, regardless of their votes to reject the act. 25 U.S.C. § 478-1.

8/ This provision derives from the Act of May 18, 1916, 39 Stat. 127. In Sampson, the court held that the provision does not apply to lands held under the IRA, because the IRA supplanted it. 483 F. Supp. at 242. See also 25 CFR 152.33(a): "The authority contained in the Act of May 18, 1916, is not applicable to lands authorized to be sold by the Act of May 14, 1948 [i.e., 25 U.S.C. § 483.]"

accomplished by the heirs executing deed approved by the Secretary, to the other heirs for their respective portions.

[2] Neither 25 U.S.C. § 378 nor 25 CFR 152.33(b) specifically requires that all co-owners of a trust allotment agree to a partition. 9/ Thus, even though this case is not subject to the analysis in Sampson because 25 U.S.C. § 483 is not involved here, the Board finds that BIA presently does not require that all co-owners agree to the partition of allotments subject to 25 U.S.C. § 378, such as Turtle Mountain Allotment 1001. The Area Director expressed this same view in his April 14, 1994, decision: "[W]e do not believe the consensus of all landowners is required."

Although unanimous agreement by the co-owners was not required in this case, BIA was entitled to take the co-owners' views into consideration in reaching a decision on the merits of appellant's request. The Area Director's decision makes it clear that he based his decision upon a conclusion that the proposed partition would not be equitable and beneficial to all co-owners. The Board rejects appellant's contention that the Area Director's decision failed to reach the merits of appellant's application.

[3] Most of appellant's remaining arguments are premised on policy considerations. BIA's decision in this case was a discretionary one. See Romo v. Acting Phoenix Area Director, 18 IBIA 16 (1989) (BIA decisions concerning partition of trust allotments are based on the exercise of discretion). In reviewing discretionary decisions made by BIA officials, the Board does not substitute its judgment for that of BIA. Rather, its responsibility is to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion. Given its limited review authority over this matter, the Board does not address the policy considerations raised by appellant.

[4] In his one remaining legal argument, appellant contends that, in denying partition, BIA has failed to fulfill its trust responsibility. Without partition, appellant argues, he will be unable to make full use of his trust land. BIA's trust responsibility in this case is toward all the co-owners. The trust responsibility does not require that BIA approve a partition that benefits one co-owner but is detrimental to the interests of the other co-owners. In this case, the Board finds no legal error in the Area Director's decision and so affirms that decision.

The Board notes that, even though appellant has not succeeded here, the possibility of achieving partition is not foreclosed to him. Appellant states that he has been attempting to get his co-owners to agree to partition since 1977 and that communications with them have been difficult

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9/ By its terms, 25 U.S.C. § 378 applies only to trust allotments. 25 CFR 152.33(b) recognizes that, in the case of allotments held in restricted fee status, all co-owners must agree to a partition, because all must execute deeds in order to effect the partition.

because they live in scattered locations around the country. He does not enclose any examples of his communications with the co-owners, and it is therefore not possible to tell whether he has ever offered them any compromise proposals or expressed any flexibility in his original proposal. The record for this appeal suggests that appellant presented only a single proposal to the co-owners, although his statement of reasons before the Area Director indicates that he would be willing to consider alternatives, including alternative tracts (Statement of Reasons at 4). Some of the co-owners' responses indicated that, while they are opposed to the particular proposal presented by appellant, they might not be opposed to partition per se.

It seems apparent from the record that communications between the co-owners on this matter have not been extensive. For instance, as far as the record shows, appellant never explained to his co-owners his reasons for wanting the particular tract he seeks. It was not until he filed his reply brief in this appeal that he stated that he has lived on the tract and presently owns a small house located there. 10/

As the proponent of partition, appellant bears the primary responsibility for negotiating with his co-owners. If, after a reasonable period of negotiations, appellant is still unable to obtain the agreement of all co-owners, he might again apply to BIA, showing the attempts he has made to accommodate his co-owners' concerns.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's April 14, 1994, decision is affirmed. 11/

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Anita Vogt
Administrative Judge

I concur:

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Kathryn A. Lynn
Chief Administrative Judge

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10/ Appellant was apparently responding to the statement made by Blanche English in this appeal that she has a sentimental attachment to this particular tract because she lived there with her grandparents. As noted above, one other co-owner also professed a similar sentimental attachment.

11/ To the extent that statements and implications in Romo concerning the applicability of 25 U.S.C. § 378 are inconsistent with the findings in this decision, they are hereby disapproved. Romo is clarified to state that the applicability of this statutory provision is in accordance with the findings in this decision.